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IN THE SUPREME COURT

OF THE UNITED STATES

(OCTOBER 1976 TERM)

GEORGE STREET,
PETITIONER

VS.

THE STATE OF GEORGIA,
RESPONDENT

MISC. NO. 76-5537

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law
409 N. Lumpkin Street
Athens, Georgia 30601
(404/542-4241)

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| THE STATES OF GEORGIA, RESPONDENT | ) | |

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

George Street, by counsel, respectfully petitions this Court on the following basis for a writ of certiorari to review the judgment of the Supreme Court of Georgia in Street v. State, 237 Ga. 307, __ S.E.2d __ , entered on 9 July 1976 (rehearing denied 22 July 1976). A copy of the opinion and judgment in that case, affirming his conviction for murder and his sentence to death, is attached as Appendix 1-18. A copy of the order denying the motion for a rehearing is attached as Appendix 19.



JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3) to issue the writ because the subjects of the Petitioner's claims in the State proceedings were (1) his right under the Sixth and 14th Amendments of the Constitution not to be sentenced to death by a jury drawn from panels from whom were excluded for cause those who harbored only general reservations about the death penalty and (2) his right under the 14th Amendment not to be deprived of his life except upon due process of law.

As the proceedings below were criminal, this petition is timely under Rule 22(1) of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, having determined on the basis of an incomplete record of the voir dire that "one juror was probably improperly excused" for her scruples against capital punishment (App. 6 ), the State Supreme Court could, consistently with Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1968), and Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), permit the Petitioner's sentence to death to stand.

2. Whether, to the extent that the transcript of the voir dire was so incomplete (in violation of the mandates of State law) that the State Supreme Court was "unable to determine if the examination was adequate under Witherspoon v. Illinois" (App. 6 ), the Petitioner was denied due process of law on the mandatory and plenary review of his death sentence under State law (Georgia Code Annotated 27-2537 [Georgia Laws 1973, pp. 159, 165) so that the extreme penalty cannot be enforced.

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The 14th Amendment: "[N]or shall any State deprive any person of life . . . without due process of law . . . ."

Georgia Code Annotated 6-805(a) [Georgia Laws 1965, pp. 14, 24]: "In all felony cases, the transcript of evidence and proceedings shall be reported as provided in Code section 27-2401, or as may hereafter be provided by law."

Georgia Code Annotated 6-805(d): "Where a trial in any . . . criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence, . . . the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be reported . . . ."

Georgia Code Annotated 27-2401 [Georgia Laws 1973, pp. 159, 169]: "On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record . . . the testimony and proceedings in the case, except the argument of counsel . . . ."

Georgia Code Annotated 26-1101(c) [Georgia Laws 1968, pp. 1249, 1276]: "A person convicted of murder shall be punished by death or by imprisonment for life."

Georgia Code Annotated 26-3102 [Georgia Laws 1973, pp. 159, 170]: "Where, upon trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be



imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death . . . ."

Georgia Code Annotated 27-2537 (Georgia Laws 1973, pp. 159, 165]:

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court . . . shall transmit the entire record and transcript to the Supreme Court of Georgia . . . .

"(b) With regard to the sentence, the court shall determine"

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. * * * *

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

## STATEMENT OF THE CASE

On 14 October 1974, the Petitioner took his wife to the Pierce County, Georgia, Hospital for the delivery of their first child. There he was advised that his wife and expected child would not be admitted beyond the emergency room until proper arrangements were made to cover their hospital expenses. (App. 1)

The Petitioner left and hailed one of the two local taxi cabs, driven (for the past 30 years) by a popular local figure (who had also driven one of the local school buses for the past 15 years) (Trial Transcript, p. 40). -1)

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-1) Pierce County had a 1970 population of about 9200 (Transcript of motion for a change of venue, p. 5).

After unsuccessfully seeking financial assistance from members of his family throughout the county, the Petitioner directed the cab to a deserted home. There an altercation allegedly broke out about his payment of the mounting cab fare. According to the Petitioner's confession, the cab driver advanced toward him with a blackjack and he pulled his knife and slashed him repeatedly and fatally in self-defense. The victim's body ended up in a well where it was discovered that evening as a result of an investigation launched when the blood-stained cab was found abandoned near the hospital. (App. 2-3)

The Petitioner was identified as the last passenger and he was arrested on the following day. He signed consent-to-search forms which led to the discovery of various incriminating items in his room, including a knife stained with human blood and some personal property which had belonged to the victim.-2) He also confessed to the homocide but maintained that he acted in self-defense. (App. 2-3)

The grand jury indicted the Petitioner for murder and armed robbery, and the State filed notice that it would seek the death penalty pursuant to Georgia Code Annotated 27-2434.1 (b)(1) and (b)(7). (App. 1, 11-12)

A motion by appointed counsel for a change of venue on grounds of pervasive and prejudicial pre-trial publicity was overruled (App. 3-5) and a jury was selected. It found him guilty of both charges and sentenced him to death for the murder and to life imprisonment for the robbery. With one Justice dissenting on State constitutional grounds, the Georgia Supreme Court affirmed both the conviction and sentence on the mandatory appeal, Street v. State, 237 Ga. 307, ___ S.E.2d ___ (9 July 1976) (App. 1-18).

Although it was relevant to the change of venue issue (see App. 3, 5) and critical to the jury selection issue presented in this petition, the jury voir dire was not recorded as required by State law, Georgia Code Annotated 6-805(d).

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-2) The Petitioner had paid some $29.00 on his family's hospital bill around noon on the 14th (App. 1).



The jury panel was qualified for scruples toward capital punishment and the one juror who expressed some reservations was excused for cause. Frome the scant record before it (the jury list with the clerk's notations [App. 11]), the State Supreme Court determined that she "was probably improperly excused" on that account (App. 6), though elsewhere it indicated that because of the lack of a transcript it was "unable to determine if the examination was adequate under Witherspoon v. Illinois [infra]" (App. 6). In sustaining nonetheless the death penalty, however, it relied upon Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976). It held that the improper excusal of one juror for his scruples against capital punishment did not require that a death penalty be set aside since it could not be said that the jury had been "organized to return a verdict of death" (App. 6). Accordingly, it concluded that it was not necessary to pass upon the efforts of the State and the trial court to reconstruct the voir dire record as to the particular juror under Georgia Code Annotated 6-805(f). -3) (App. 6)

## REASONS FOR ISSUING THE WRIT

I. THE JUDGMENT BELOW IS PROBABLY NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

In Witherspoon v. Illinois, 391 U.S. 510, 89 S.Ct. 1770, 20 L.Ed.2d 776 (1968), this Court flatly held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," 391 U.S. at 522. See also Boulden v.

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-3) In Owens v. State, 233 Ga. 869 at 872-3, 214 S.E.2d 173 (1975), the Georgia Supreme Court held: "A post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review functions." It concluded flatly "that failure to record the Witherspoon voir dire in a case where the sentence is death is reversible error."

Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

Having concluded on the scant record before it that the single venireman who represented that portion of the community with reservations as to capital punishment was "probably improperly excused" (App. 6), the Georgia Supreme Court was powerless to avoid the mandate of Witherspoon. It sought to do so, however, by applying its own holding in Davis v. State, supra, -4) that "The rationale of Witherspoon and its progeny is not violated where merely one of a qualified class or group is excluded and where it is shown . . . that others of such group were qualified to serve," 236 Ga. at 809. -5)

Essentially, the Georgia Supreme Court has approved a harmless error inquiry in the face of any Witherspoon violation. This Court, however, has never countenanced any such inquiry. Indeed, in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), this Court implicitly eschewed any such test. The record in that case, State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1970), evidently reflected that a proper standard had been applied with only two possible exceptions (though as in the case below the voir dire transcript was incomplete), 245 A.2d at 195-96. Nonetheless, this Court summarily reversed the death sentence without comment.

No harmless error test is appropriate for any Witherspoon violation which could have disturbed in a death case the critial "link between contemporary community values and the penal system . . . without which the determination of punishment could hardly reflect 'the evolving

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-4) An application for a writ of certiorari to review Davis v. State was filed in this Court around 18 September 1976.

-5) Actually, the Georgia Supreme Court watered down Davis to hold that it controlled the case below, for in the record of this case there was no indication that any other scrupled veniremen were on the panel and were qualified to serve.



standards of decency that mark the progress of a maturing society,'" Gregg v. Georgia, ___ U.S. ___ at ___, 96 S.Ct. 2909 at 2933, ___ L.Ed.2d ___ (1976) (quoting Witherspoon, supra at 519n., and Trop v. Dulles, 356 U.S. 86 at 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). No such test is appropriate both where the consequences to the accused are so grave and where even greater than usual reliance falls upon the jury to act as a buffer to possibly overzealous prosecution, cf. Wood v. Georgia, 370 U.S. 375 at 390, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

Indeed, even where only a single venireman is involved, no harmless error test is reasonably viable for, as Justice Ingram (joined by Chief Justice Nichols) wrote in dissent in Davis v. State, supra 812 at 814:

> The error would not be harmless because nobody knows (. . . not even the majority of this Court) whether the State would have exercised one of its statutory strikes to excuse this juror if she had not been excused for cause by the trial judge. If she had not been excused but rather had served on the trial jury, who can say, without boasting of clairvoyance, that she would not have influenced her fellow jurors to impose a sentence other than death?

II. THE JUDGMENT BELOW IS IN DIRECT CONFLICT WITH DECISIONS BY THE LOCAL FEDERAL CIRCUIT COURT OF APPEALS.

There is an unresolved conflict among the jurisdictions which have considered the question of whether the improper exclusion of a single or a comparative few scrupled veniremen should bar the execution of a death sentence. In accord with Georgia holding that such an exclusion does not result in an unfairly stacked jury where other scrupled veniremen were admitted to the panel are, e.g., Bell v. Patterson, 402 F.2d 394 (10th Cir. 1968), Hawkins v. Wainwright, 245

So. 2d 287 (Fla. 1971), State v. Monk, 212 S.E.2d 125 (N.C. 1975), Pittman v. State, 434 S.W.2d 352 (Tex.Ct.Cr.App. 1968). Other jurisdictions, among them the Fifth Circuit Court of Appeals which embraces Georgia, have reached exactly the opposite conclusion: e.g., Marion v. Beto, 434 F.2d 29 (5th Cir. 1970), cert. den. 402 U.S. 906 (1971), Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970), Liddell v. State, 251 So. 2d 601 (Ala. 1971), People v. Schader, 457 P.2d 841 (Calif. 1969).

Comity considerations weigh in favor of this Court finally resolving the conflict between the Supreme Court of Georgia in Davis v. State, supra, and the case below and the Fifth Circuit in Marion v. Beto, supra, and Hackathorn v. Decker, 438 F.2d 1363 (1971).

III. THE JUDGMENT BELOW INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION WHICH THIS COURT HAS NOT HERETOFORE ENTERTAINED: WHETHER THE UNLAWFUL ABSENCE OF A COMPLETE VOIR DIRE TRANSCRIPT, CRITIAL TO A FULL AND EFFECTIVE REVIEW OF SPECIFIC ISSUES RAISED ON AN APPEAL IN A DEATH CASE WHICH IS MANDATORY UNDER STATE LAW, CONSTITUTES A DENIAL OF APPELLATE DUE PROCESS OF LAW SECURED BY THE 14TH AMENDMENT.

Georgia law provides for a broad and mandatory appellate review of both the conviction and sentence in any death case, Georgia Code Annotated 27-2537. See Gregg v. Georgia, supra. It specifically requires that the State Supreme Court "shall consider the punishment as well as any errors enumerated by way of appeal." It must specifically find that the sentence was not imposed under the influence of passion or prejudice.

Other State statutes also require that "all . . . proceedings which may be called into question on appeal or other post-trial procedures . . . be reported," Georgia Code Annotated 6-805(d), and this statute clearly embraces any voir dire of the jury to determine its qualifications under Witherspoon v. Illinois, supra. The State Supreme Court, moreover, has conceded that it generally cannot satisfactorily perform its broad and mandatory review functions as to Witherspoon issues without a full voir dire transcript, Owens v. State, supra, Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975).



In cases such as the one below, where the State Supreme Court attempted to adjudicate the Witherspoon issue on a plainly inadequate record, the denial of the Petitioner's right to appellate due process is clear, particularly insofar as it also implicates the ability of counsel to assist him effectively. Cf. Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964).

However, the process of law due the Petitioner under Georgia's death review provisions was also frustrated below in other respects besides the Witherspoon issue.

In any death case, whether the jury imposed the sentence under the influence of prejudice or passion is material, but the Petitioner also raised a particular and substantial issue concerning pervasive and allegedly prejudicial pre-trial publicity in the small community where the homocide occurred. In his brief, he insisted that "although it is not reflected in the record, numerous jurors indicated on voir dire that they were acquainted with the facts of the case either through having read about it in the newspapers or some other means" (App. 3).

The absence (contrary to State law) of the voir dire transcript completely prevented the State Supreme Court from realistically discharging its responsibilities with respect to these two matters also. After revieving the authorities on the publicity point, for example, it "conclude[d] that under the decisions of the Supreme Court of the United States, to find that the petitioner did not receive a fair trial, petitioner must show . . . (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible.

"The Appellant Street has shown neither" (App. 5).

Without the full record to which he was entitled, he could hardly have shown actual community prejudice reflected in the jury or any basis of prejudice and passion which could have tainted the sentence. Without a full record, his attorney could not have effectively assisted him.

The record below is an appropriate vehicle on which this Court could reach the constitutional issues it deferred in Hardy v. United States, supra.

## CONCLUSION

This Court should issue a writ of certiorari to the Supreme Court of Georgia and vacate its judgment sustaining the Petitioner's death sentence.

Respectfully,

James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law
409 N. Lumpkin Street
Athens, Georgia 30601
(404/542-4241)